UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S LICENSE NO. 441480
Issued to: Thomas F. O'CALLAGHAN, Z-88292

DECISION OF THE COMMANDANT
UNITES STATES COAST GUARD

2062

Thomas F. O'CALLAGHAN

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 28 August 1975, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's license for six months and revoked the "Radar observer" endorsement thereon upon finding him guilty of misconduct. The specification found proved alleges that while acting under authority of the license above captioned, on or about 3 August 1973, Appellant wrongfully and knowingly obtained from the United States Coast Guard, at Coast Guard Marine Inspection Office, Baltimore, Maryland, a renewal of an existing radar endorsement on his Master's license No. 441480, through the presentation of a false document attesting to his satisfactory completion of the Radar Safety and Navigation Course at the Maritime Institute of Technology and Graduate Studies, which course he had in truth and in fact not satisfactorily completed, the false document concerned being: Maritime Institute of Technology and Graduate Studies Certificate of Advanced Training Collision Avoidance Radar, dated 26 January 1973, which document, if valid, would have lawfully entitled him to said endorsement under the authority of 46 CFR 10.02-9(b)(5).

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence certain documents and the testimony of witnesses.

In defense, Appellant offered in evidence several documents and the testimony of himself and several witnesses.

At the end of the hearing, the Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then entered an order revoking Appellant's radar observer endorsement and suspending his license for a period of six months.

The entire decision was served on 5 September 1975. Appeal was timely filed on 17 September 1975 and perfected on 10 March 1976.

FINDINGS OF FACT

In August 1973, the regulations governing qualifications for endorsement as "radar observer" on a deck officer's license and setting forth procedures for obtaining that endorsement appeared in Title 46, Code of Federal Regulations, at sections 10.02-9 and 10-05-46. Provision was made for the substitution, under certain conditions, of a certificate of completion of a course of training in an approved school for the demonstration or examination otherwise required.

On 10 February 1971, the Chief, Office of Merchant Marine Safety, U.S. Coast Guard Headquarters, by a letter addressed to Appellant in his capacity as Chairman of the Board of Trustees of the Maritime Advancement, Training, Education and Safety Program (a body which administered MITAGS, a school connected with the Masters, Mates and Pilots Union), approved the course of study leading to a certificate of completion. This certificate was to be acceptable under the provisions of the two Code sections mentioned. On 25 September 1972, that same official, by letter, approved the MITAGS course under 46 CFR 10.02-9, but withheld approval under Section 10.05-46.

On 3 August 1973, Appellant presented himself to the Acting Officer-in-Charge, Marine Inspection, Baltimore, Maryland, and applied for renewal of his expired Master's license which carried an endorsement as "radar observer." In connection with this act, he submitted a sealed envelope which contained a certificate which, on its face, evidenced that Appellant had successfully completed a course of training in use of radar at MITAGS. Appellant had not, at any time, entered upon, taken or completed the stated course of training. Appellant's application form was filled out and he signed it. He was not required to demonstrate or take other examination in proficiency in use of radar. He was issued a renewal of license with endorsement as radar observe.

Appellant was aware throughout of the Coast Guard regulations for radar observer endorsements, of the letter of approval of the MITAGS course, of the nature of the certificate presented by him, and of his own non-completion of the course of training covered by the certificate.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that there is no jurisdiction over the alleged offense in this proceedings and that there is insufficient evidence on which to base a finding that Appellant's acts were wrongful.

APPEARANCE: Marvin Schwartz, Esq., New York, New York; Pierson and Pierson, Baltimore, Maryland.

OPINION

I.

The argument on which Appellant principally relies for his appeal is the asserted lack of authority under R.S. 4450 (46 U.S.C. 239) to proceed against a license in cases like this. It is keyed, primarily, to the words "acting under the authority of [the license]" which are essential to the jurisdiction in the allegation in his case. "Misconduct" under that statute, he asserts, is limited to consideration of actions performed in the service of a vessel. Several specific reasons are advanced as supporting this conclusion, and these will be dealt with singly, at least to the point where they coalesce.

At the outset, Appellant notes that the statute does not in terms define "Misconduct" and he looks to the general intent of the statute, the regulations based upon it, and previous interpretative decisions for support.

II.

Appellant has noted Decision on Appeal No. 2039, in which it was held that R.S. 4442 authorized action to suspend or revoke the license of pilot issued under that section for negligent action in circumstances in which the "acting under...authority" phrase of R.S. 4450 did not attach. Accepting arguendo that R.S. 4442, 4439, 4440, and 4441 provide such authority independently of considerations of "acting under... authority," Appellant reads into that phrase in R.S. 4450 a limitation to acts in the service of a vessel for which service the holding of the license is required. Essentially, this means that the other statutes reach to more general aspects of qualification like character and habits while the direction of R.S. 4450, tied in as it is to immediate investigation of casualties and specific acts, necessarily is toward actions of the individual aboard this or that particular vessel in discharge of his duties, the performance of which is a matter under investigation by the R.S. 4450 tribunal.

The distinction which Appellant urges between R.S. 4450 and the other statutes is not so marked as Appellant would have it. These other statutes proved, as grounds for proceeding, such specifics as "inattention to duties," "bad conduct," and even permitting a boiler to "become in bad condition." While the case in Decision on Appeal No. 2039 itself is not before me now it can be remarked that the conduct involved there was not of the "general qualification"type but was directly concerned with the navigation of a vessel. Thus, it cannot be concluded that the other sources of authority must be resorted to unless the conduct is directly in the service of a vessel in the course of which the holding of the license in question in required. It may be added that under this aspect of the matter alone there is no help to Appellant for, while it is not necessary in this case, under the holding of Kuhn v Civil Aeronautics Board, CA D.C. (1950), 183 F.2nd 839, so long as the matter of jurisdiction was litigated, it would not be fatal to have mislabeled the statutory authority in the pleadings and the process could have been changed from "R.S. 4450" to "R.S. 4439," under which, by his own hypothesis, Appellant would have to concede jurisdiction.

III.

Under the same argument Appellant cites two statements as controlling, one regulatory, the other decisional.

The regulatory statement is the one at 46 CFR 5.01-35. This section, captioned "Acting under authority of license, certificate, or document," reads as follows:

> "A person employed in the service of a vessel is considered to be acting under the authority of a license, certificate or document held by him either when the holding of such license, certificate or document is required by law or regulation or is required in fact as a condition of employment. A person does not cease to act under the authority of his license, certificate or document while ashore on authorized or unauthorized shore leave from the vessel."

This appellant urges, is a statement of the scope of the statute with respect to "Misconduct" and bars from consideration as grounds for proceeding any action not connected, as a first necessary condition, with service to a vessel. Employment under authority of the license aboard a vessel is, he concludes, a since qua non condition.

This section of the regulations must, of course, be looked at in context to be correctly understood. It does not purport to be a definition of the "acting under...authority" phrase; it does not appear in the "Definitions" subpart (5.02) of this part of the regulations. It does not say "A person acting under the authority of a license...is one who is employed aboard a vessel..." It is explanatory and exemplary, not exclusive. It gives some elaboration of cases in which a person who is in fact employed aboard a vessel is "considered" to be acting under authority of the license. It anticipates, as it were, two potential proffers of defense: "No law required me to have a license to work on that particular ship on that particular voyage" and "What I did was not on board the ship but was done ashore." It sums up, for convenience and general guidance, a long series of specific holdings in concrete cases dating back in fact to rulings of predecessor authorities as much as three quarters of a century ago. To go with the non-exclusive nature of this explanatory regulation there is also a line of decisions bearing upon conduct not involving employment aboard a vessel which forms precedent and notice of construction of the disputed phrase very much in point here. (This will be discussed appropriately in connection with Appellant's argument which consciously adverts to the precedents.)

The decisional statement on which Appellant relies is taken from Decision on Appeal No. 2039, referred to in "II" above. He quotes from this:

> "On the other hand, the authority to suspend or revoke contained in R.S. 4450 was designed to cover the activities of the holder in discharging his duties aboard vessels committed while he was acting under authority of that license."

Appellant argues that this recognizes as fundamental to exercise of jurisdiction under R.S. 4450 the necessary condition of activities in connection with duties performed aboard a vessel, barring action under the statute when the acts under scrutiny are connected to the securing of a license, not to

service on a ship.

Here again, the context of the quoted language must be seen. Statutory pronouncements enacted over a period of more than century can reasonably be expected to contain overlapping provisions and even apparent inconsistencies. A single example of one such phenomenon is the provision in each of the four statutes cited in "II" above, as well as in R.S. 4450 itself, that violation of a provision of Title 52 of the Revised Statutes may be grounds for suspension or revocation of a license. From different approaches the party in the case in Decision on Appeal No. 2039 and Appellant both would constrict the broad applications of the statutes to carve away the application to each, leaving, if the process were correct, nothing applicable to anyone. Just as the statutes must be construed for harmony, the process of construing reflects only the immediate considerations in issue.

The point of the language quoted by Appellant from Decision No. 2039 was not that the other statutes covered non-ship connected activities with R.S. 4450 limited to shipboard performance only, but that of two different classes of shipboard activity one was directly within the scope of R.S. 4450 while the other fitted within another law even if not under R.S. 4450. The Decision did not say that R.S. 4450 was limited any more than it said that the two statutes considered were mutually exclusive in their coverage.

IV.

Attention may be given now to those earlier decisions which have been concerned with conduct and activity similar to that involved here. Appellant refers specifically to Decision on Appeal No. 2025 as directly indicating a lack of jurisdiction in R.S. 4450 over the perpetration of a falsity in the application process by a seeker of a license or certificate, and remarks that other, still earlier decisions are not controlling because the precise issue was not raised before. Once again, Appellant would misdirect the application of the prior statements.

In Decision on Appeal No. 2025 it was held that where there was a falsification by an applicant in the obtaining of a seaman's license or certificate for which the holding of such a document was not a pre-condition the falsification could not be said to be in the course of acting under the authority of the document which had not yet been issued. From this Appellant would deduce that it is fatally inconsistent to hold that his license, if renewal was obtained with the help of a falsification, can be within the R.S. 4450 jurisdiction since the substantive acts complained of are identical with those in Decision No. 2025.

Appellant is correct in perceiving that the two acts are essentially identical, but the circumstances permit a variety of remedial actions. In the case in Decision No. 2025 I pointed out that while jurisdiction under R.S. 4450 was lacking, the document in question was void ab initio because of the fraud. Here, for the time, I need not look to the initial invalidity at all because the predicate for the R.S. 4450 jurisdiction is that the holding of the Master's license by Appellant was a necessary precondition for the renewal of that license just as, generally, a lower grade license is a precondition

for application for a raise in grade and possession of a license is a precondition for obtaining an endorsement thereon. Of course, the fact, in these instances, that the later issued license is a different physical entity from its predecessor is not destructive of the continuing identity.

Far from Decision on Appeal No. 2025's overruling or annulling earlier statements on false applications, as if it were truly a case of novel impression dealing with a question never before considered, it was a decision made pertinent only because the charges went beyond what had been long known to have been actionable. Decision Nos. 309, 832, and 1381 all approved the actions taken under R.S. 4450 for falsifications made by the holders in the process of application. Although the jurisdiction was not attacked by the appellants in those cases, it was implicitly affirmed. No utterance by way of dictum was appropriate because the parties, while contesting factual issues, accepted the propriety of the exercise of jurisdiction and the question was not one to arise sua sponte. Since Appellant here has specifically raised the issue, it is now proper to affirm the jurisdiction specifically and to point out that the history of consideration of the statute consistently gives support to its application in similar cases in which the misconduct which formed the matter of the offenses did not in itself involve service aboard a ship. As the Administrative Law Judge has already pointed out, in 19 Op.Atty.Gen. 649(1890) the opinion was given that the alteration of a license to give the appearance of a higher grade than that held, an act not involving service aboard a vessel, was a predicate for action to revoke the license under R.S. 4450. (To avoid possible misunderstanding, while that opinion characterized action under this statute as the only redress available to the agency, it is noted that there was not other pertinent statute at the time, a situation that was remedied by Congress.) In the same vein, at 24 Op. Atty.Gen. 136 (1902), it was held (citing an opinion of the Solicitor of the Treasury given in 1893) that a refusal to testify in a proper inquiry was grounds for suspension or revocation of a license.

On these precedents it is seen that there is nothing novel in the assertion of jurisdiction under R.S. 4450 in the instant case, and the assertion is compatible with the regulation, as mentioned in "II" above.

The other basis for appeal here is, stated briefly, that no fraudulent intent on Appellant's part was established.

As to this, the argument that another person at an earlier date obtained renewal of a license with a radar observer endorsement at Baltimore without either meeting the demonstration or examination requirement or presenting an approved certificate is completely irrelevant. The one issue here is what Appellant did.

Appellant offered several reasons why what he did not constitute the offense of wrongfully obtaining a license renewal by presentment of a false certificate of completion of the MITAGS course.

The facts that Appellant may not have "ordered" the issuance of the certificate to himself, that he might not have looked at it before presenting it to the license examiner in Baltimore, that he subjectively considered himself preeminently qualified to hold a certificate, and that he could "easily"

have met the demonstration-examination test had he chosen to undergo one have no bearing upon the matter. (This last assumed fact, incidentally, is belied by the record which shows that the Administrative Law Judge permitted Appellant to give a demonstration of facility at the hearing. In the words of the initial decision: "The demonstration was not an unqualified success. During the course of the demonstration [Appellant] was forced to correct his diagrams on a number of occasions; he conceded a few times that he had 'fouled up' the solutions, and despite corrections, some of his answers were incorrect.")

As to Appellant's qualifying assertion that his position and the attendant circumstances necessarily negative any inference of wrongful intent, all of these matters have been adequately dealt with in the opinion of the Administrative Law Judge whose analysis leads inevitably to the conclusion that the knowledge and intent of Appellant on 3 August 1973 cannot be evaluated as other than precisely as charged. At any rate, since intent is ascertainable from the actions of Appellant and their circumstances and the facts are as they are, there is substantial evidence on which to predicate the ultimate findings made, if, indeed, any other result could have been reached by another trier of facts.

VI.

Above, I have refrained from elaborating on the status of Appellant's license with respect to validity. Here, for the moment, it is appropriate to indicate one matter which remains open and, in the strictest sense, beyond the scope of the order which follows.

The Administrative Law Judge, in assessing Appellant's situation in the circumstances that induced him to follow the course he chose to obtain renewal of his license, observed: "[Appellant] had too much pride in his Master's license...to accept the renewal of his license without the Radar Observer endorsement..." Under the regulations in effect at the time of Appellant's application for renewal of his license there was no way in which a deck officer's license with a radar observer endorsement could have been renewed without such an endorsement.

CONCLUSION

There was jurisdiction under R.S. 4450 to proceed against Appellant's license in this case and the allegations of the specification of misconduct were proved by the requisite evidence.

ORDER

The order of the Administrative Law Judge entered at New York, New York, on 28 August 1975 is AFFIRMED.

E. L. PERRY
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 8th day of July 1976.

INDEX